Filed 3/9/10 P. v. Burgess CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JASON LAMAR BURGESS, Defendant and Appellant.	B214875 (Los Angeles County Super. Ct. No. TA092131)

APPEAL from a judgment of the Superior Court of Los Angeles County, John T. Doyle, Judge. Modified and affirmed.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Paul M. Roadarmel, Jr. and Jaime L. Fuster, Deputy Attorneys General, for Plaintiff and Respondent.

Jason Burgess appeals his conviction of three counts of attempted murder and one count of shooting at an inhabited building. He claims there was insufficient evidence of identification to support his convictions. He also claims the prosecution's gang expert was improperly permitted to give opinions on the ultimate issue of whether the crime was committed for the benefit of the gang and that the court failed to obtain appellant's personal waiver of his right to be present at several critical stages of the proceedings. He raises several instances of prosecutorial misconduct, and asserts sentencing errors. We modify the sentence and affirm the judgment as modified.

FACTUAL AND PROCEDURAL SUMMARY

On August 7, 2007, 17-year-old twins Claudious and Claudio Johnson were in their aunt's garage on 112th Street in San Pedro, playing dominoes with their 12-year-old cousin, Otha. At approximately 5:00 p.m., they saw a white Buick Regal drive past the house twice. Ten minutes later, as the car drove by for the third time, the front passenger pointed a chrome revolver out of the front passenger side and fired four to six shots. The shots hit the garage wall.

After the shooting, but before police arrived, the boys talked about the identity of the shooter. Claudio said he thought the shooter was a person named Jason, who went to Locke High School with him. Claudio had two classes with this person. Claudious also thought it was Jason, based on his own view of the shooter, not because Claudio mentioned him.

Los Angeles Police Officers Jason Archie and Dan Pearce responded to the location of the shooting and spoke to the three boys. Claudious told Officer Archie he recognized the shooter as someone from his high school named Jason. Otha described the driver as a male black with cornrows, wearing a white T-shirt. He described the shooter as a light-skinned male black.

About an hour after the police left, one of Otha's sisters came home. She brought out a yearbook from Locke High School, and Claudio and Claudious found a photograph

of appellant, Jason Burgess, in the yearbook. Claudio and Otha both remarked that appellant was the shooter.

The police officers stopped two individuals near the shooting location who matched the descriptions given by the three boys. At a field "show up," Claudio and Otha identified codefendant LJ Anderson as the driver of the white car. They said that the other individual, Jason McKinley, was not the shooter. The three boys were later shown photographic lineups. Each one selected appellant's photograph as the shooter.

Appellant and Anderson were charged with three counts of attempted murder, one count of shooting at an inhabited building, with allegations that the offenses were committed for the benefit of a criminal street gang, and that appellant personally and intentionally discharged a firearm. After a joint trial, appellant was convicted as charged. The jury was unable to reach a verdict as to Anderson, and a mistrial was declared as to him. This is a timely appeal from the judgment of conviction.

DISCUSSION

I

Appellant claims the evidence of identification was insufficient to support the judgment. He argues that he was convicted "after two adults and an eight-year-old child fingered him as the shooter even though the witnesses only saw the suspects for half a second at a distance of 36 to 50 feet under highly stressful and unexpected circumstances."

In reviewing a sufficiency of evidence claim, "an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1128.) Any conflict, contradiction, or inconsistency in the testimony of witnesses must be resolved by the trier of fact, which is the sole judge of the credibility of witnesses. (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1258-1259.) Applying these standards, we find sufficient identification evidence.

Contrary to appellant's claim, the three victims had at least two opportunities to see the shooter, not just "half a second." Claudious testified that he saw a car pass by his aunt's house two times, and on the third time shots were fired from the passenger side of the car. He knew it was the same car because he recognized what kind it was, an old, messed up, "mixmatch Regal" with a different color on the trunk. He recognized the shooter as appellant "[s]oon as I seen him." The first time the car drove by, Claudious did not see any passengers in the car. He did not see appellant, and could not see the driver. The second time the car drove by, Claudious saw two people inside. Appellant looked in his direction, and Claudious recognized him. The third time the car drove by, appellant looked in Claudious's direction and made eye contact with him. Claudious acknowledged that the shooting happened quickly, but he said that did not affect his ability to see appellant as the shooter because he recognized him.

Right after the shooting, Claudious spoke with his brother Claudio and his cousin Otha about the shooting. His brother said that the shooter looked like Jason from high school, and Claudious agreed. Claudious already thought appellant was the shooter, before Claudio mentioned appellant's name. When Claudious selected appellant's picture from a photographic lineup the day after the shooting, he wrote: "Number four look like the shooter because he was light and the hair cut is like I seen him around."

According to Claudious, about an hour after the three witnesses talked to the police, Otha's sister took out a yearbook from Locke High School. Claudio found a picture of appellant in the book. Claudio and Otha both said that was the person who was the shooter. Claudious testified that looking at the yearbook photo did not affect his belief that appellant was the shooter.

Claudio testified that when the white car drove by the second time, appellant looked toward the garage where he, Claudious, and Otha were sitting. He estimated that the car was about 30 feet from where he was in the garage. In 11th grade, Claudio had two classes with appellant at Locke High School. He had never had any arguments or fights with him, either during high school or after. His brother, Claudious, mentioned appellant's name after the police left the house; Claudio already knew it was appellant

before his brother said anything. Claudio recognized appellant as soon as the car drove by the second time. Claudio saw appellant's face before he saw appellant's gun. They made eye contact before appellant shot at him. The car was approximately 36 feet from where he was sitting. Once Claudio saw the gun, he ran.

Soon after the shooting, the police took Claudio to see some suspects who had been stopped in a white vehicle. Claudio was able to identify the driver. He did not know that person from prior contact. Claudio did not identify either of the other two suspects at this show-up.

Claudio testified that after the shooting, when he, Claudious and Otha were talking about what happened, Claudious said he thought the person who did the shooting "'looked like Jason from Locke High School.'" Claudio then responded, "Yeah, it was him." According to Claudio, no one brought out a high school yearbook to find appellant's picture. On the day after the shooting, Claudio selected appellant's picture from a photo lineup. He wrote: "The reason why I thought it was him because I know his face good and he fired like three or four shots." He wrote that the shooter's name was Jason, that he went to school with him for two years, and that he has a brother who looks like him, but "a little thicker" than he is.

Otha was 12 years old at the time of the shooting. He testified that he only saw the white car one time on the day of the shooting. He saw the car when he looked up from the game he was playing with his cousins, and he saw the passenger's hand come out of the car with a gun in it. He saw the gun first, and then looked up at the shooter's face "[s]o I can know who did it." He identified appellant as the passenger with the gun, who did the shooting. When the shooting started, Otha "froze" because it was the first time he had ever been shot at. He could not move, he just looked at the gun and at the passenger's face. His cousin Claudious pushed him to the floor. After the shooting, Otha remembered Claudio and Claudious saying it was "Jason" who did the shooting. He did not know who they were talking about, and he did not recall anyone showing him a yearbook picture of appellant. The police officer who showed him a photographic lineup told him to pick out the one who looks most like the shooter. Otha selected appellant's

picture because he had the lightest complexion in the six-pack, and because "It's just that's who I saw in the car."

To the extent Otha's age (12 years old, not eight, as asserted by appellant) may have been a factor in his credibility, appellant presented Dr. Robert William Shomer, an experimental psychologist who testified on eyewitness perception, memory and identification. Dr. Shomer testified that "the younger the witness, the more susceptibility to suggestion. It is not as if younger people's vision is impaired. But, remember, this is not a case of a camera. This is a case of interpretation. Younger witnesses interpret things differently. The difference is the greater susceptibility to suggestion. So if someone suggests something – I think I might have recognized this guy – theoretically, they could be right. They could be wrong. Theoretically, it could be the guy. It could be somebody who looks like the guy. The suggestion is there." With this expert testimony, the jury was in a position to consider Otha's age and suggestibility when evaluating his eyewitness account of the shooting, including his identification of appellant.

Viewing the evidence in the light most favorable to the judgment, there is ample identification evidence. All three eyewitnesses selected appellant's picture from a photographic lineup. Claudio and Claudious testified that they saw the passenger in the car twice, not once. They immediately recognized appellant from high school as the passenger who did the shooting. Claudio and Otha denied looking at appellant's picture in the yearbook; Claudious stated the yearbook did not affect his identification. Although there were inconsistencies between their statements to police officers and their testimony at the preliminary hearing and at trial, it is the province of the jury, not this court, to resolve them. (*People v. Watts, supra,* 76 Cal.App.4th at pp. 1258-1259.)
It did so, and substantial evidence supports its determination.

II

The prosecution called Detective Erik Shear to testify as a gang expert. It was Detective Shear's opinion that appellant was a "solid" member of the Backstreet Crips.[1] Appellant does not challenge this opinion. He claims the court erred in allowing the detective to testify on the ultimate issue of whether the crime was committed for the benefit of a criminal street gang within the meaning of Penal Code[2] section 186.22, subdivision (b)(1)(C). We find no error.

Under Evidence Code section 801, expert opinion testimony is admissible if the subject matter of the testimony is sufficiently beyond common experience that the opinion of the expert will assist the trier of fact. (*People v. Gardeley* (1996) 14 Cal.4th 605, 617.) "The subject matter of the culture and habits of criminal street gangs, of particular relevance here, meets this criterion." (*Ibid*.)

An expert may render an opinion on the basis of facts given in a hypothetical question, if that hypothetical is rooted in facts shown by the evidence. (*People v. Ward* (2005) 36 Cal.4th 186, 209.) In this case, Detective Shear was presented with a hypothetical involving facts identical to this case. This was a proper hypothetical.

Over defense objection, Detective Shear was allowed to give his expert opinion, based on the hypothetical, whether the shooting was done for the benefit of a criminal street gang. It was the detective's opinion that "absolutely," the crime was committed at the direction of, or for the benefit of, the Backstreet Crips. As to the shooter, Detective Shear explained that there was an ongoing feud between the Backstreet Crips and the Eleven Deuce gang, with shootings going back and forth. "[C]ommitting another shooting against the Eleven Deuce neighborhood shows that Backstreet Crips are not afraid. They are not going to be intimidated. They are not going to be punks in the gang

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[1] Appellant had admitted his membership in the Backstreet Crips to Detective Shear and to other police officers; items recovered from appellant's room contained references to the Backstreet Crips; and Detective Shear had seen appellant on numerous occasions in the company of other Backstreet members.

[2] All statutory references are to the Penal Code unless otherwise indicated.

world." He felt an even stronger basis was the reputation of the gang as "a violent gang that is not afraid to shoot at people and do whatever they have to do to get the job done. The reason that is so important is because of how gangs survive and how they make money and how they exist. They do all the crimes that I mentioned before: selling drugs, robberies, stealing cars during burglaries." The gang "can't go into a rival gang neighborhood and do that. They do that within their own neighborhood where they feel safe. When they do that in that neighborhood, it benefits them so much to have people scared of them knowing these guys will try to kill you. With that fear, people are less likely to call the police. People are less likely to come to court and testify. They are less likely [to] go outside of their home and confront the gang or make life difficult for a gang. With that fear and reputation, it allows them to control that neighborhood without even doing anything to people because people know what they do."

Relying on *People v. Killebrew* (2002) 103 Cal.App.4th 644, appellant claims this testimony exceeded the permissible scope of expert opinion. In *Killebrew*, the trial court allowed a gang expert to testify that "when one gang member in a car possesses a gun, every other gang member in the car knows of the gun and will constructively possess the gun." (*Id*. at p. 652.) The defendant claimed these opinions on the subjective knowledge and intent of the occupants of the car were improperly admitted. The Court of Appeal agreed, noting that the officer "testified to the subjective *knowledge and intent* of each occupant in each vehicle. Such testimony is much different from the *expectations* of gang members in general when confronted with a specific action." (*Id*. at p. 658.) The court held this type of opinion did nothing more than inform the jury how the expert believed the case should be decided, and thus was improper opinion on the ultimate issue. (*Ibid*.)

Unlike the expert in *Killebrew*, Detective Shear did not express an opinion on the knowledge or intent of a defendant on trial; he testified about the culture, habits, expectations and motivation of gang members. This is proper expert opinion. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 946; *People v. Ward*, *supra*, 36 Cal.4th at p. 210.)

The court gave specific limiting instructions with respect to this expert testimony. After direct examination of Detective Shear, the court told the jury: "[T]his officer has given you an opinion as to why he feels this crime, if you believe it was committed, was done to benefit, promote or done in association with a gang. . . . His testimony is an opinion of why the crime is committed for the benefit of a gang if it was committed. It in no way should affect the deliberative process on who is responsible for the commission of the shooting. His testimony in no way should aid you in your deliberative process as to whether or not these specific individuals were responsible for the shooting, and in no way corroborates the identifications—the testimony of other witnesses about who were responsible for committing the crime." The jury also was instructed that it could disregard or discount any expert opinion that it found was unreasonable, unbelievable, or not supported by the evidence, and that it had to decide whether the facts assumed in a hypothetical had been proven. We conclude there was neither error nor prejudice in the admission of this expert opinion testimony.

III

Appellant claims the court erred in failing to obtain a personal waiver of his right to be present at several critical stages of the proceedings. A criminal defendant charged with a felony has a due process right under the Fifth and Fourteenth Amendments to the United States Constitution, as well as a right to confrontation under the Sixth Amendment, to be present at all critical stages of the trial. (*People v. Romero* (2008) 44 Cal.4th 386, 418.) Under section 977, a felony defendant may waive his or her presence at all stages of the trial other than arraignment, plea, presentation of evidence, and sentencing by personally executing a written waiver of the right to be present. (§ 977, subd. (b)(1).)

A criminal defendant does not, however, have the right to be present at every hearing held in the course of a trial. (*People v. Concepcion* (2008) 45 Cal.4th 77, 81.) "A defendant's right to be present depends on two conditions: (1) the proceeding is critical to the outcome of the case, and (2) the defendant's presence would contribute to the fairness of the proceeding." (*Id.* at p. 82.) Section 977 does not require the

defendant's presence, or a written waiver, unless that standard has been met. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1052.) The defendant must show that a violation of this right resulted in prejudice or violated his or her right to a fair and impartial trial. (*Ibid.*)

Appellant asserts five instances when he was not present and did not personally waive his presence: when the court read a stipulation to the jury about codefendant's fingerprint; when a proposed stipulation about ballistics was discussed; when the admissibility of exhibits was discussed; when an Evidence Code section 402 hearing was conducted with respect to a witness as to codefendant's case; and when the court announced it was declaring a mistrial, but then took the guilty verdict. The first four instances do not appear to be critical to the outcome of the proceeding as to appellant, nor is there any indication that his presence would have contributed to the fairness of the proceedings. More importantly, appellant makes no argument whatsoever that he suffered prejudice because of his absence from these hearings.

Appellant does assert prejudice as to the remaining instance, which occurred on July 15, 2008, during jury deliberations. Juror No. 6 had indicated that she was scheduled to go to Sacramento because her daughter was having surgery. Appellant's counsel informed the court he was "in position to waive" his client's presence at the hearing where this issue was discussed with the juror. Codefendant's counsel did the same. Juror No. 6 then stated that she had reservations to fly to Sacramento the next morning to help her daughter who was having surgery the following day. She was scheduled to return on July 30.

The court asked whether the parties would stipulate to having 11 jurors. Appellant's counsel initially said he would. Codefendant's counsel refused to do so and objected to discharge of the juror. In light of that, appellant's counsel indicated he would object to the court discharging the juror or declaring a mistrial. All counsel asserted there was no good cause to discharge Juror No. 6 because she did not need to be in Sacramento until July 17. The court stated it found good cause to excuse the juror for hardship over all parties' objections, and to declare a mistrial.

After further urging of counsel, the court stated it would not yet declare a mistrial, and ordered Juror No. 6 to try to reschedule her flight to later in the day. The jury foreperson then suggested that the jury was willing to continue deliberating into the evening because even a few hours the following morning might not be enough time for it to complete its work. The court asked how many ballots had been cast, and the foreperson said there were two as to each defendant. The court then asked what the split was on each vote. The foreperson indicated that as to appellant, the first one was 10 to two, and the second one was 12 to zero. The court observed that sounded like a verdict, and the foreperson said yes and indicated the verdict forms had been filled out, although not yet signed. As to the codefendant, the splits were nine to three, then eight to four.

The court directed the foreperson to sign the verdict forms as to appellant, then proceeded to read the verdicts and poll the jurors. The court ultimately declared a mistrial as to codefendant Anderson.

Appellant argues that if he had been present when the trial court decided to dismiss the juror and declare a mistrial, he "could have informed defense counsel he wanted a mistrial, and a mistrial would have been declared before the guilty verdict was returned." Given that the prosecutor and codefendant's counsel argued there was no good cause to discharge Juror No. 6, it is unreasonable to conclude that the court would have proceeded differently had appellant informed his counsel of his preference for a mistrial. This became a certainty once the court learned, upon further inquiry, that a verdict had been reached as to appellant. A court has the discretion to receive a partial verdict knowing that one of the jurors later would be excused for good case. (*People v. Thomas* (1990) 218 Cal.App.3d 1477, 1488.) Appellant has not shown he was prejudiced by his absence from this hearing. Thus, any violation of his right to be present at this hearing in the absence of a written personal waiver was harmless.

IV

Appellant asserts several instances of prosecutorial misconduct. First, he claims there was a continuing discovery violation because the prosecutor failed to turn over the business address for witness Arnold Corlin, despite an informal discovery request and a

later formal order. Corlin was either the property owner or manager of the apartment complex where appellant lived. The prosecutor argued Corlin's home address should be withheld because other witnesses had been threatened and because Corlin was a reserve police officer. The court conducted a hearing on the issue pursuant to section 1054.7, then ordered the prosecutor to provide Corlin's business address to defense counsel. On June 18, 2008, during trial, appellant's counsel complained that the address provided by the prosecutor was the Southeast Los Angeles Police Station. The prosecutor asserted this was an appropriate means of contacting Corlin, and noted he also had provided Corlin's cell phone number. The court directed the prosecutor to provide Corlin's business address, if he had it. The court indicated it would order the prosecutor's investigator to provide the address if the problem persisted.

On June 24, 2008, Corlin was called as a prosecution witness. Appellant did not object, nor did he raise any further claim that he had been unable to locate the witness. Any delay in providing contact information for Corlin was harmless.

Next appellant claims the prosecutor reneged on representations he had made to defense counsel and the court. The first instance arose during appellant's opening statement. Defense counsel referred to appellant's interrogation by the police: "[T]hey asked him where he was that day. Jason was insistent throughout the interrogation. He knew nothing about a shooting. He wasn't involved in a shooting, and he didn't do a shooting." The prosecutor objected to this reference to appellant's exculpatory statements on hearsay grounds, and stated he was "not going to play that part of the tape." Appellant's counsel argued, and the court agreed, that if the prosecutor played a portion of the tape, the defense would be allowed to play the remainder. The prosecutor responded, "Then I'm not going to play it." The court noted that was "a new change in tactic that you've just expressed." The prosecutor replied, "I never said I was going to play the tape." The court disagreed: "You told us you were going to play the tape. There was a motion. You said you looked over the motion yesterday and that you were probably in agreement with most of it." The prosecutor disagreed: "I'm talking about the statements. Judge, I never said I was playing the tape. I was talking about the

statements coming in, and they can come in through the I.O." The court disagreed with the prosecutor's characterization of his earlier remarks, and pressed the prosecutor for a decision about introducing the statements. Unwilling to commit at that point, the prosecutor withdrew his objection, and defense counsel proceeded with his opening.

"Conduct by a prosecutor that does not violate a court ruling is misconduct only if it amounts to 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury' [citations] or 'is so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process' [citation]." (*People v. Silva* (2001) 25 Cal.4th 345, 373.) No such harm resulted from the prosecutor's change in strategy.

Appellant also argues the prosecutor impeded the trial by reneging on an agreement to allow the defense to call a witness out of order. Apparently, there had been a sidebar discussion in which the prosecutor reluctantly agreed that the defense could call Dr. Shomer during the prosecution case-in-chief to accommodate the doctor's schedule. A few days later, when appellant's counsel sought to call Dr. Shomer, the prosecutor objected, explaining: "I believe it would be detrimental to the case to call Dr. Shomer before Detective Shear because there is other evidence that Detective Shear will talk about that strengthens not only the identification, but the entire case as a whole." The court allowed Dr. Shomer to be called out of order. There was clearly no harm from the prosecutor's objection.

Appellant characterizes as "egregious" the prosecutor's use of a crime committed by appellant's half brother, Paul Burton, to establish one of the predicate gang offenses for the gang enhancement. Before this evidence was introduced, appellant objected, arguing that the fact that Burton was appellant's half brother would be prejudicial. The court precluded the prosecutor from bringing out the fact that the two men are related. There was no misconduct in the use of this crime, particularly in light of the court's ruling.

Appellant claims the prosecutor referred to evidence outside the record when, during closing argument, he told the jury that witnesses were so afraid that when they

were coming to court, they demanded a police escort. Appellant objected, and the court observed there was evidence that witnesses had asked to be escorted, and testimony "that somebody said that they would come to court if they were given a ride." Detective Shear testified that he picked up Claudio and Claudious and drove them to court because they told him "that was the only way they were coming to court is if someone was there because they were scared and someone was there to pick them up." The prosecutor was entitled to argue that point, and his phrasing was not inflammatory or improper.

Appellant claims the prosecutor improperly attempted to discredit the defense identification expert by arguing additional details which had not been presented as evidence. The prosecutor argued that Dr. Shomer's testimony that a witness would not be able to identify a person he had seen before did not make sense. "No, he can't testify as to whether or not the witnesses in this case were correct in their identification, but he can—he could have tested them to see how stress affected them. That's different. Did he do that?" Defense counsel objected. The court noted there was no evidence that the expert could test the individuals or that such testing was an accepted practice, and told the prosecutor to move on.

The prosecutor then argued that the jury should not credit Dr. Shomer's testimony because he spent so much time talking about people who had been exonerated because of witness identification: "Do you think in those cases—I can tell you in those cases they did not have three witnesses identifying two people with fingerprints corroborating the evidence, motive, statements by the defendants. Those cases weren't like this one. Those were single witness I.D. cases with little to no corroborative evidence." Appellant's objection that he was arguing facts not in evidence should have been sustained.

According to Dr. Shomer, in "long-exposure" sexual assault crimes, 75 to 80 percent of convictions found to be wrongful were based on the victim's erroneous identification of the perpetrator. The prosecutor was entitled to distinguish the eyewitness identifications in this case from the erroneous identifications in the cases described by Dr. Shomer and relied on by defense counsel. It was legitimate to infer

from Dr. Shomer's testimony that in the long-exposure sexual assault cases he referred to, there were no identification witnesses other than the victims. "By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence." (*People v. Falsetta* (1999) 21 Cal.4th 903, 915.) But the prosecutor overstepped when he stated: "I can tell you" that those cases did not involve several witnesses identifying the perpetrators, corroborating evidence, and statements by the perpetrators. There was no evidence to that effect. We note, however, that the reference was brief, and the potential harm minor.

After defense counsel objected to the prosecutor's attempt to distinguish the wrongful conviction cases, the prosecutor remarked: "That's how you know it's a good argument when they object." The court sustained its own objection to that comment, and instructed the jury to disregard it.

Considered singly or together, these statements were not prejudicial. They were brief comments, and the court immediately limited any potential harm. The court also instructed the jury that the attorneys' statements were not evidence and that all questions of fact should be decided based on the evidence received at trial, nor from any other source. The asserted improprieties were mild, immediately corrected, and thus harmless.

V

We turn to the claims of sentencing error. Appellant asserts the term on count eight should be stayed pursuant to section 654 because the shooting at an inhabited dwelling was an indivisible part of the shooting which was the basis for the attempted murder offenses in counts five, six and seven. We disagree.

Section 654 bars separate punishment for multiple crimes arising out of a single, indivisible course of action. "There is a multiple victim exception to . . . section 654 which allows separate punishment for each crime of violence against a different victim, even though all crimes are part of an indivisible course of conduct with a single principal objective." (*People v. Felix* (2009) 172 Cal.App.4th 1618, 1630-1631.)

The charged victims of the attempted murder counts were Claudio, Claudious and Otha, who were inside the garage of Jacqueline Thompson's home. But there was

evidence that two of the bullets went through the garage wall into a closet on the inside of the house. Thompson's son, Otha, testified that one of his sisters was home at the time of the shooting. Appellant's counsel introduced Otha's preliminary hearing testimony that his brother Charles was present at the time of the shooting and saw the white car. Otha's two siblings were victimized by the shooting into the dwelling, and were not named victims in any other count. Under the multiple victim exception to section 654, the trial court properly declined to stay the sentence on count eight. (See *People v. Felix, supra*, 172 Cal.App.4th at p. 1631.)

Finally, the parties agree that the abstract of judgment must be modified to accurately reflect the life terms imposed by the trial court. Appellant was sentenced to a term of life in prison with a 15-year minimum parole eligibility date on counts five, six and seven. The abstract of judgment should be corrected to specify the minimum parole eligibility date for each of those counts.

The trial court imposed enhancements under both subdivisions (b) and (c) of section 12022.53 on count seven. Under section 12022.53, subdivision (f), only one additional term was proper for that crime. (See *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1130.) The abstract of judgment must be corrected to stay the 10-year enhancement for section 12022.53, subdivision (b).

DISPOSITION

The abstract of judgment is to be corrected in accordance with the views expressed in this opinion, and a copy is to be sent to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

EPSTEIN, P.J.

We concur:

MANELLA, J.

SUZUKAWA, J.